U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 17929067

Date: SEPT. 1, 2021

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Alien Worker (Advanced Degree, Exceptional Ability, National Interest Waiver)

The Petitioner, an IT systems manager, seeks second preference immigrant classification as a member of the professions holding an advanced degree and/or as an individual of exceptional ability, as well as a national interest waiver of the job offer requirement attached to this employment based "EB-2" classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2).

The Director of the Nebraska Service Center denied the petition, concluding that the Petitioner qualifies as an individual of exceptional ability, but that he had not established that he is well positioned to advance his proposed endeavor and that, on balance, the United States would benefit from waiver of the required job offer, and thus of the labor certification requirement.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will withdraw the Director's decision and remand the matter for further consideration and the entry of a new decision consistent with the following analysis.

I. LAW

To establish eligibility for a national interest waiver, a petitioner must first demonstrate qualification for the underlying EB-2 visa classification, as either an advanced degree professional or an individual of exceptional ability in the sciences, arts, or business. Because this classification requires that the individual's services be sought by a U.S. employer, a separate showing is required to establish that a waiver of the job offer requirement is in the national interest.

Section 203(b) of the Act sets out this sequential framework:

> (2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. –

(A) In general. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

(B) Waiver of job offer –

(i) National interest waiver. . . . [T]he Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The regulation at 8 C.F.R. § 204.5(k)(2) contains the following relevant definitions:

> *Advanced degree* means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.
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> *Exceptional ability in the sciences, arts, or business* means a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business.

In addition, the regulation at 8 C.F.R. § 204.5(k)(3)(ii) sets forth the specific evidentiary requirements for demonstrating eligibility as an individual of exceptional ability. A petitioner must submit documentation that satisfies at least three of the six categories of evidence listed at 8 C.F.R. § 204.5(k)(3)(ii). This, however, is only the first step, and the successful submission of evidence meeting at least three criteria does not, in and of itself, establish eligibility for this classification.[1] When a petitioner submits sufficient evidence at the first step, we will then conduct a final merits determination to decide whether the evidence in its totality shows that the beneficiary is recognized as having a degree of expertise significantly above that ordinarily encountered in the field. 8 C.F.R. § 204.5(i)(3)(i).

While neither the statute nor the pertinent regulations define the term "national interest," we set forth a framework for adjudicating national interest waiver petitions in the precedent decision *Matter of Dhanasar*, 26 I&N Dec. 884.[2] *Dhanasar* states that after EB-2 eligibility has been established, USCIS

[1] USCIS has previously confirmed the applicability of this two-part adjudicative approach in the context of aliens of exceptional ability. USCIS Policy Memorandum, *Evaluation of Evidence Submitted with Certain Form I-140 Petitions; Revisions to the Adjudicator's Field Manual (AFM) Chapter 22.2, AFM Update AD11-14*, PM-602-0005.1 (Dec. 22, 2010).

[2] In announcing this new framework, we vacated our prior precedent decision, *Matter of New York State Department of Transportation*, 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998) (*NYSDOT*).

may, as a matter of discretion, grant a national interest waiver if the petitioner demonstrates: (1) that the foreign national's proposed endeavor has both substantial merit and national importance; (2) that the foreign national is well positioned to advance the proposed endeavor; and (3) that, on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification.

The first prong, substantial merit and national importance, focuses on the specific endeavor that the foreign national proposes to undertake. The endeavor's merit may be demonstrated in a range of areas such as business, entrepreneurialism, science, technology, culture, health, or education. In determining whether the proposed endeavor has national importance, we consider its potential prospective impact.

The second prong shifts the focus from the proposed endeavor to the foreign national. To determine whether he or she is well positioned to advance the proposed endeavor, we consider factors including, but not limited to: the individual's education, skills, knowledge and record of success in related or similar efforts; a model or plan for future activities; any progress towards achieving the proposed endeavor; and the interest of potential customers, users, investors, or other relevant entities or individuals.

The third prong requires the petitioner to demonstrate that, on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification. In performing this analysis, USCIS may evaluate factors such as: whether, in light of the nature of the foreign national's qualifications or the proposed endeavor, it would be impractical either for the foreign national to secure a job offer or for the petitioner to obtain a labor certification; whether, even assuming that other qualified U.S. workers are available, the United States would still benefit from the foreign national's contributions; and whether the national interest in the foreign national's contributions is sufficiently urgent to warrant forgoing the labor certification process. In each case, the factor(s) considered must, taken together, indicate that on balance, it would be beneficial to the United States to waive the requirements of a job offer and thus of a labor certification.[3]

II. ANALYSIS

As noted earlier, the focus of the first prong analysis is on the endeavor itself. Here, the Petitioner states that his endeavor will incorporate his experience as an IT systems manager and will focus on the Petitioner's "expertise and knowledge in the field of computer and IT systems" in the United States. The Petitioner stated that he has experienced "notable success directing a broad range of initiatives" in the IT field and anticipated that his plans to provide IT project management services and systems analysis will "help advance the U.S. economy in the area of computer and IT systems and technology." The Petitioner further predicted that his proposed endeavor will positively impact the United States because it will allow him to use his knowledge of IT systems management to: "fix, maintain and improve IT systems"; "[w]ork on large-scale and highly complex IT projects . . . and cross-border IT initiatives"; [e]nhance the technological and commercial facets of U.S. IT companies"; "[g]enerate value and optimize operations"; enable U.S. companies to "seize market and investment

[3] *See Dhanasar*, 26 I&N Dec. at 888-91, for elaboration on these three prongs.

opportunities abroad"; and improve the U.S. economy through job creation, contributing to the U.S. gross domestic product, and generating tax revenue.

Here, although the Director issued a request for evidence (RFE), he did not seek further information regarding the proposed endeavor's national importance. To evaluate whether the Petitioner's proposed endeavor satisfies this requirement, we look to evidence documenting the "potential prospective impact" of his work. Whether the Petitioner's endeavor merits a national interest waiver is a matter that should be determined by correctly applying the *Dhanasar* framework within the context of a comprehensive analysis, which should start with proper consideration of the evidence pertaining to the first prong of that framework. Here, despite concluding that the Petitioner's proposed endeavor meets the national importance requirement of *Dhanasar's* first prong, there is no indication that the Director adequately contemplated the lack of evidence to support that conclusion. Notwithstanding this lack of a comprehensive analysis of the first prong, an element that is the foundation of a comprehensive *Dhanasar* analysis, the Director proceeded with an analysis of the second prong, which shifts the focus from the proposed endeavor to the foreign national.

In sum, the Director did not accurately explain the deficiencies in the evidence. *See* 8 C.F.R. § 103.3(a)(1)(i); *see also Matter of M-P-*, 20 I&N Dec. 786 (BIA 1994) (finding that a decision must fully explain the reasons for denying a motion to allow the respondent a meaningful opportunity to challenge the determination on appeal). As such, the Director's decision cannot be affirmed. On remand, the Director should consider the evidentiary deficiencies pertaining to the national importance element of the first prong of the *Dhanasar* framework. Before concluding that the Petitioner has satisfied this prong, the Director should consider whether the record has sufficient evidence to demonstrate that the proposed endeavor stands to sufficiently extend beyond his prospective employers or clients to impact the IT field more broadly at a level commensurate with national importance and whether the endeavor has significant potential to employ U.S. workers or otherwise offers substantial positive economic benefits for our nation. The Director may issue an RFE requesting additional evidence addressing these factors. The Director shall then analyze the evidence under the *Dhanasar* framework to determine whether the endeavor meets the national importance requirement.

ORDER: The Director's decision is withdrawn and the matter is remanded for further consideration and the entry of a new decision consistent with the above analysis.